STATE OF MICHIGAN

COURT OF APPEALS

In re TD.

TD,

Petitioner-Appellee,

v

PEOPLE OF THE STATE OF MICHIGAN,

Respondent-Appellant.

FOR PUBLICATION
May 26, 2011

No. 294716
Washtenaw Circuit Court
Family Division
LC No. 2006-001101-DL
Advance Sheets Version

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*concurring*).

I concur with the majority because the majority correctly explains that registration under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is not "punishment" under Michigan law. Therefore, the trial court impermissibly determined that it constituted "cruel and unusual punishment" in this case. I write separately because I believe the trial court expressed very well-founded concerns that merit further discussion.

Obviously, I do not take any exception to the purposes and legitimacy of SORA's registration requirements. Indeed, I expressly approve of it. See *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007). My concern is with the public nature of the registration here for a respondent who was charged and "convicted" as a juvenile. Michigan has a public policy, as reflected in our history and our statutes, of protecting juveniles and treating them specially, even when finding them responsible for reprehensible acts. Courts may (and in some cases must) waive jurisdiction and, as a result, minors may be prosecuted as adults. See *People v Conat*, 238 Mich App 134, 139-143; 605 NW2d 49 (1999). However, unless a waiver occurs, "our justice system [distinguishes] between juvenile delinquency and adult criminal conduct." *In re Wentworth*, 251 Mich App 560, 568; 651 NW2d 773 (2002).

"Evidence regarding the disposition of a juvenile under [chapter XIIA of the Probate Code] and evidence obtained in a dispositional proceeding under [chapter XIIA of the Probate

Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [chapter XIIA of the Probate Code]." MCL 712A.23.[1] The purpose of this statute is to protect minors from the public being aware of immature mistakes.[2] *People v Smallwood*, 306 Mich 49, 53; 10 NW2d 303 (1943); *Wentworth*, 251 Mich App at 568. The goal of rules sealing or expunging juvenile records "is to prevent a juvenile record from becoming an obstacle to educational, social, or employment opportunities." *People v Smith*, 437 Mich 293, 303; 470 NW2d 70 (1991) (opinion by LEVIN, J.). Indeed, "the paramount purpose of the juvenile section of the Probate Code is to provide for the well-being of children." *In re Macomber*, 436 Mich 386, 390; 461 NW2d 671 (1990). In fact, proceedings against juveniles are not even considered criminal proceedings. *Wentworth*, 251 Mich App at 568.

Registration cannot violate the prohibition against cruel or unusual punishment unless it is, in fact, "punishment." *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999). While I agree with the majority that *Ayres* remains valid and binding law, I think it is a closer question than does the majority, because at the time of the trial in *Ayres*, the registration database was only available to the public during normal business hours through law enforcement authorities, and information about registrants who had been juvenile offenders was not available to the public at all. See *Ayres*, 239 Mich App at 12, 18-19. Although the *Ayres* Court did adopt the analyses of federal courts holding that sex offender registration and notification was not cruel and unusual punishment, the Court further stated that

> [i]n light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders, we conclude that the registration requirement imposed by the act, as it pertains to juveniles,

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[1] While TD's "general" records would be "open to the general public," MCR 3.925(D)(1), I disagree with the majority's conclusion that there is no substantive difference between a file available upon request by someone who knows of its existence and takes the trouble to request it and a public database on the Internet available to any idly curious person with no investment of time or energy whatsoever and possibly even by accident. There are degrees of openness, and obscurity is itself a measure of privacy protection, albeit not a complete one.

[2] The trial court found that the assault at issue in this case was more in the nature of juvenile horseplay that got carried away than truly predatory sexual conduct and that it was a fairly low-severity offense. I am unsure that I would be so dismissive of an attack that left the victim so traumatized. But the trial court is in the best position to evaluate the demeanor and credibility of witnesses before it, and it found that TD understood the gravity of his offense, had been impressively courteous and respectful, and presented a very low risk for recidivism. More tellingly, the prosecutor conceded that TD had been offered a plea agreement that would *not* have required him to register as a sex offender, and indeed the prosecutor was of the view that such registration was unnecessary. However, my view in this case is based strictly on TD's status as a juvenile offender. Had TD lacked any mitigating characteristics, the prosecutor could have moved to have him waived to adult court, MCL 712A.4, obviating the instant discussion. The prosecutor did not even attempt to do so here.

> neither "punishes" respondent nor offends a basic premise of the juvenile justice system—that a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses. [*Id.* at 21.]

In fact, the *Ayres* Court deemed highly important to its conclusion that registration was not constitutional "punishment" the "fact that public access to registration data regarding juveniles is foreclosed . . . ." *Id.* at 19. But in September 1999, SORA was amended to create a public, Internet-accessible registry available to anyone, and that registry includes juvenile offenders. *People v Dipiazza*, 286 Mich App 137, 142-143, 146-147; 778 NW2d 264 (2009). I believe that the majority does not give enough weight to the burden that public registration places on registrants. See *id*. at 152-153.[3]

However, the mere fact that a state action is onerous does not, by itself, make that action a "punishment." As I have said, the purpose of SORA is noble and simply cannot be carried out without burdening some individuals. "Unfortunately the scheme has never yet been devised by human invention by which the power to do great good has not been mingled with the power to do some evil." *People v Gallagher*, 4 Mich 244, 255 (1895). The purpose of SORA is to protect the public and help people to protect themselves from predators, thereby reducing recidivism, empowering people, promoting safety in general, and preventing one of the more horrific kinds of crime in particular. It does not purport to have any rehabilitative value for registrants, but at the same time, any harm to registrants is simply incidental. I do not believe we should therefore pretend that no such harm transpires, but the critical problem is simply that registering people who are *demonstrably not dangerous* makes it more difficult conceptually to regard SORA as the nonpunishment tool it should be.

This is thrown into sharp relief here, where the burdens of registering run directly contrary to the purposes of our laws regarding juveniles. Even further, when there is good reason to find that the registrant is not a predator and is highly unlikely to be a sexual offender again in the future, requiring his or her registration *actually undermines* the important purpose underlying SORA. It would encourage members of the public to demonize and fear a person who is, it seems, at least no more dangerous than any other member of the public.[4]

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[3] However, I agree that *Dipiazza* is critically distinguishable because the registrant in *Dipiazza* was technically not convicted of an offense for which registration would have been required, and he factually did not even commit a nonconsensual act. I think it is highly significant that the prosecutor here did not believe TD really needed to be on the registry and that TD was found responsible as a juvenile rather than convicted as an adult. But he has been technically "convicted," MCL 28.722(a)(*iii*), and while this Court should defer to the trial court's factual findings, including that TD engaged in more of a prank than a predation, what he did was not consensual. TD simply has a record that the registrant in *Dipiazza* did not.

[4] Again, the prosecutor could have moved to charge TD as an adult because he was at least 14 years old and charged with what would have been a felony for an adult. MCL 712A.4. Had TD been charged with first-degree criminal sexual conduct, the prosecutor could have charged him as an adult without seeking a waiver from the trial court. MCL 764.1f.

Simultaneously, it would encourage members of the public to trivialize the predators who really *are* dangerous. Compelling registration of individuals who can with some degree of reliability be determined not to be threats thereby reduces SORA—at least to some extent—from a tool that empowers people and communities to help protect themselves to a pointlessly life-destroying piece of "security theater."[5] Divesting the trial court of the power to relieve persons such as TD from the requirement of registration makes the world *less* safe for all of us.

Nevertheless, this is a policy decision. I believe very strongly that SORA is a vital and powerful tool. I am concerned that its efficacy is drastically impaired by the registration of people known to not be likely predators and of juvenile offenders who were not deemed sufficiently dangerous to warrant even an attempt to have them waived to adult court; the latter undermines the purposes of our juvenile justice system, as well. I strongly urge our Legislature to consider giving our trial courts the means to enhance SORA by exercising discretion to remove from the registry or decline to register people who can be shown to be not dangerous. But I cannot agree with the trial court that TD's registration here constitutes cruel and unusual punishment; it is simply unwise.

/s/ Amy Ronayne Krause

[5] "Security theater" refers to undertakings that provide only a feeling of security instead of providing real security. See Schneier, *Beyond Fear: Thinking Sensibly About Security in an Uncertain World* (New York: Copernicus Books, 2003), pp 38-40.